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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 613

MITCHELL ROSS,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Mitchell Ross, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Western District of Virginia, Roanoke Division,

was entered on the 3rd day of January, 1963, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the said judgment, was filed September 13, 1963, and is not yet reported but is set forth in the appendix hereto and in the certified copy of the record.

JURISDICTION.

Petition For Rehearing was timely and properly filed and was denied on October 14, 1963 and is not yet reported. On October 4, 1963, Petitioner filed his Verified Petition To Stay Issuance of Mandate and the same was, on October 14, 1963, denied. The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1).

QUESTIONS PRESENTED

1. Does due process of law under the Fifth Amendment to the Constitution of the United States permit further proceedings, even if they are otherwise valid, upon an indictment where it manifestly appears upon the face of the record subsequently made that the said indictment was obtained exclusively by uncorroborated perjured testimony, testimony favorable to the indictee and the totally hearsay averments of investigating officers?

2. Does procedural due process under the Fifth Amendment to the Constitution of the United States require the Government to be bound by the legal theory propounded to the jury in its final argument and to rely on

no other legal theory in subsequent judicial proceedings in obtaining or sustaining a favorable verdict?

3. Does due process of law under the Fifth and Sixth Amendments to the Constitution of the United States permit a verdict to be sustained where it is manifest on the face of the prior record that the Government knowingly indulged in the use of perjured testimony?

4. Will due process of law under the Fifth and Sixth Amendments to the Constitution of the United States permit the sustaining of a jury verdict rendered under instructions by the Court where the said instructions included no advice or admonition pertaining to considerations of credibility to be attached to the admittedly perjured testimony of a witness where a Government witness admitted during the trial that he had committed perjury with respect to a matter material to the cause therein and where such an instruction was tendered by the accused?

5. Will due process of law under the Fifth and Sixth Amendments to the Constitution of the United States permit the sustaining and affirming of a jury verdict obtained and a judgment rendered pursuant thereto where the verdict was rendered under instructions by the Court which were without the scope of the Government's legal theory of action as propounded to the jury upon final argument?

STATEMENT OF THE CASE.

Defendant was convicted by the jury on a One Count Indictment charging that on or about May 23, 1962 he knowingly transported or caused to be transported a woman, Mary Lynn Payne, alias Mrs. Mitchell Ross,

alias Mrs. Marberger, for the purpose of prostitution, debauchery and other immoral purposes, all in violation of 18 U.S.C. 2421. Defendant was found guilty and was sentenced to a term of four (4) years imprisonment.

EVIDENCE.

The Government in the trial of this case offered five witnesses. The first witness, Mrs. Ruth K. Wallis, testified that the defendant was registered at the Patrick Henry Hotel on several occasions with a woman as his wife, nothing else (A-47). The second witness, Robert L. Brannon, Special Agent with the Federal Bureau of Investigation, testified that in an interview with the defendant, that the defendant told him of his trips to Roanoke, Virginia, with a woman as man and wife. The witness testified that Ross told him that he had no knowledge whatsoever of any prostitution on the part of Mrs. Payne and denied that there was any prostitution on her part (A-55-56-57). The third witness, Ben Henderson, a bellhop, testified that he and other bellhops made various dates for Mrs. Payne at the Patrick Henry Hotel and that she engaged in the acts of prostitution on the various occasions when she registered there as the wife of the defendant in the year, 1962, and that working on the same shift with him went to other bellhops who also made dates for Mrs. Payne. The names of the two other bellhops were Dodie Byers and Richard Rogers (A-68), that he secured dates for her (A-69), that there was a system for working girls at the Hotel where he worked (A-71), that there was various methods used to secure and fill dates for Mary Lynn Payne, alias Mrs. Mitchell Ross (A-73-74-75), that sometimes defendant Mitchell Ross paid him money as his cut of the proceeds of the date (A-77), that on one occasion there

was about three men besides defendant in the room (A-77), that at one time defendant gave witness money on the elevator (A-78), that whenever things were slow defendant would ask what the matter was and to go out and get us some business (A-78), that some of the other boys on the nightshift obtained dates for her (A-79), namely Dodie Byers and Richard Rogers, that on November 12, before the appearance before the Grand Jury, defendant said to witness and Richard Rogers and Dodie Byers, "You don't know nothing" (A-88), that witness said, "I don't. Don't worry. I don't know nothing." That on November 13, witness testified before the Grand Jury and that on noon of that day he had a conversation with defendant and he told defendant the F.B.I. man was in there and defendant said that he heard that he had told them, and I said "partially" meaning the Grand Jury (A-90).

That the F.B.I. agent Settle talked to witness 10 to 15 minutes on the telephone sometime in August of 1962 (A-93), that he didn't know how long it was that he saw him after the conversation and that the F.B.I. agent never did make any notes or read any notes to him as to the subject matter of the telephone conversation (A-95), that he testified before the Grand Jury on November 12 (A-96), that he didn't have any reaction after defendant talked to him on November 12 (A-100), that he had a conversation with defendant around noon of November 13 (A-101), that the conversation with defendant on November 12 didn't bother him or didn't affect his testimony before the Grand Jury the first time (A-104), that his testimony in front of the Grand Jury the second time was true (A-105), that witness did not tell defendant the truth on November 13 when he said "Partially"

(A-106). That witness testified three times in front of the Grand Jury and that he talked to Mr. Settle, the F.B.I. agent, before he went in the second time (A-110), that witness did not tell the same story the second time as he did the first time in front of the Grand Jury and that he changed his story in front of the Grand Jury the second time (A-111). That after he testified the second time in front of the Grand Jury he talked to a member of the F.B.I. (A-112), that the F.B.I. agent took him home and talked to him and that the F.B.I. agent brought up to witness that he had no cause to fear when we were going home (A-113), that he went before the Grand Jury the next day which was the third time (A-116), that on the morning of November 13, he talked to the F.B.I. agent in his office and he told me to go into the Grand Jury room and tell the truth (A-116), that he went the third time in front of the Grand Jury because "evidently they hada't finished". (A-118), that the conversation witness had with defendant on November 13 at noon "it didn't bother me" (A-119), that witness checked Mr. and Mrs. Ross in Room 501 at the Hotel. (A-121), that he recognized defendant as being a guest at the Hotel last year (A-122), that the conversation with the F.B.I. Agent Settle for 10 or 15 minutes was sometime in August of 1962 (A-123), that witness was wrong, that he did have conversations with Mr. Settle, the F.B.I. agent, concerning Ross and that was one time he was on day duty (A-125). That the F.B.I. Agent Settle, by his statement "You let me down," meant that he didn't tell the Grand Jury what he told up there, that she was working over in the Hotel (A-126), that there was a system in existence at the Hotel with reference to getting women for sometime prior to May of 1962 (A-128), that there were at least 8 or 9 other

bellboys working at the time around April or May of 1962 in the Hotel (A-129), that witness imagined that they were engaged in the operation, the same as he was, and that this included the two other boys Rogers and Byers, who testified before the Grand Jury (A-130), that the name of one person who he secured for Mrs. Ross was Paul Chewning and that witness talked to him about this case today and talked to him about what his testimony was going to be about and that this conversation was in the presence of another F.B.I. agent (A-131), and that the picture of the lady was shown to the witness (A-132). He talked to witness Chewning after he saw the pictures (A-133), that two F.B.I. agents talked to Chewning and showed him the picture (A-134), that Mr. Settle took notes and read the notes back to witness and asked if they were the same notes that he had given to agent (A-135), that Mr. Chewning was the only person he identified as being solicited for this woman (A-136).

The Government rested after Delores Henderson, the colored maid, testified, but stated to the Court through its representative, Lawrence Musgrove, the Assistant United States Attorney, that there were two other bellhops summoned to Court, that he would not vouch for their veracity, therefore he would not call them as Government witnesses, but left it to the Court whether the Court would call them as Court witnesses. After some discussion Judge Dalton decided to call both parties as Court witnesses and gave the defense the privilege of examining the witnesses first, that is, before the Government examined them.

Both witnesses, Byers and Rogers, who Henderson said worked with him on the same shift, and who Henderson

said joined with him in making dates for Mrs. Payne, denied vehemently any prostitution or any impropriety in the conduct of Mrs. Payne while she was at the Hotel registered as the wife of the defendant.

(Defendant rested at the conclusion of the Government's case).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

18 U.S.C.A., Sec. 2421 provides as follows: "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States —

Shall be fined not more than $5,000.00 or imprisoned not more than five years or both."

The Fifth Amendment to the Constitution provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use."

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

REASONS FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFYING THE SAME

Certiorari should be granted to determine important questions with respect to basic rights guaranteed by the Constitution of the United States, but never passed upon by this Court.

The Fifth and Sixth Amendments to the United States Constitution provide that no person shall be deprived of liberty without due process of law and that an accused shall be advised of the nature and cause of the accusation against him.

It Petitioner must grant that the record bears no definite indication as to which conflicting branch of either of the sole prosecuting witness's testimony was true. The fact remains that only one witness presented any evidence in support of the Government's theory in submitting the case to the jury and that the said witness contradicted every material element of his testimony with other sworn testimony uttered during proceedings pursuant to the adjudication of this cause.

In view of the fact that it is a matter of record that the sole witness's testimony was perjured by his own sworn utterances and in view of the further fact that the Government had no other evidence in support of its theory of submission, it is, therefore, manifest on the record that the Government used uncorroborated testimony which it had probable cause to believe was false and it is further manifest on the record, from the testimony of the said uncorroborated witness, that the said testimony was procured through the pressure brought to bear by the investigating officers.

Where a conviction is obtained by the presentation of testimony which the prosecuting officials know to be perjured, the Constitutional requirements of due process are not satisfied. These requirements —

> " cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty

through the deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

MOONEY v. HOLOHAN,
294 U. S. 103.

It is urged that your Petitioner's cause differs from that in *Mooney v. Holohan* in two respects which cancel each other and render this cause equivalent to that in the *Mooney* case. Here there was uncorroborated testimony with respect to which there was only probable cause for the investigating officers to believe it perjured. But here, unlike the *Mooney* case, there is incontrovertible evidence of pressure and intimidation which was not present in the *Mooney* case but which was acknowledged by the *Mooney* decision to be equivalent to the known use of perjured testimony.

It is submitted that our civil law would not permit a piece of expensive property to be transferred from a defendant to a plaintiff upon evidence of the extent and sort submitted by the Government in this cause. How much more insufficient is the Government's case when measured by the criterion of sufficiency which must be applied in determining whether a sufficient case has been made to deprive an individual of something so dear as liberty itself!

2. In the decision in this cause which was rendered by the United States Court of Appeals for the Fourth Circuit, it was noted as follows in the fourth footnote to the said decision:

"The Court's (i.e. trial court's) instructions approved the basis of the Attorney's submission of the case. As submitted, the principal issue before the jury was the prostitution vel non of the victim. In this Court, the Government sought to dismiss the appeal upon the ground that it conclusively appears that the purpose of the interstate transportation was the engagement by defendant and victim in illicit sexual relations. It advances the unquestioned principle that it was not incumbent upon it to prove that the purpose encompassed hiring of the female for the sexual gratification of others than the defendant."

"Since we have found that the evidence warranted a finding of prostitution of the female, we do not consider whether, in the light of the Government's trial concession and the basis of the submission of the case to the jury, the conviction might stand in the absence of such evidence."

If this petition is granted it will patently appear on the face of the record that the United States Court of Appeals for the Fourth Circuit misread the record even as it appeared in part in the prevailing party's own Appellate Brief. In the *Brief and Appendix of Appellee* presented in this cause below it appears on page 29 of the said document that the trial Court's instructions did not "approve the basis of the Attorney's submission of the case" and that they went well without the scope of the basis of the Government's Attorney's submission. The following instruction was given by the trial Court and is quoted in full in the Government's Brief and Appendix.

"The Court instructs the jury that though you may find and believe from the evidence in the case, beyond a reasonable doubt, that on or about the 25th day of May, 1962, the defendant knowingly trans-

ported the woman from Indianapolis, Indiana to the City of Roanoke, in the Western Judicial District of Virginia, one Mary Lynn Payne, alias Mrs. Mitchell Ross, alias Mrs. Marberger, and though you may find from the evidence, beyond a reasonable doubt, that the said Mary Lynn Payne, alias Mrs. Mitchell Ross, alias Mrs. Marberger, after reaching Roanoke, Virginia, engaged in acts of prostitution, or other immoral acts, it is still your duty, and you must find defendant not guilty unless you further find beyond a reasonable doubt, that it was with his intent and, for the purpose of having the said Mary Lynne Payne, alias Mrs. Mitchell Ross, alias Mrs. Marberger to prostitute herself, *or engage in other immoral acts.*" (emphasis added).

It is submitted here and it will be urged if this Petition is granted that the Government is bound by its theory of submissions, and it is grounds for new trial where the Court's instructions go beyond the scope of said theory. It is further submitted here and it will be urged, if this Petition is granted that the Government is estopped to prevail upon a broader theory of action than its theory of submission. It is also submitted here and it will be urged, if this Petition is granted, that where an Appellate Court has misconstrued the record and it is advised that it has misconstrued the record in a Petition For Rehearing, it is error to allow such a decision based upon such a misconstruction to stand.

Footnote four (4) to the decision of the United States Court of Appeals for the Fourth Circuit establishes that the said decision is predicated upon the Appellate finding that "the evidence warranted a finding of prostitution of the female." It appears nowhere in the said decision that there was an Appellate finding that there was sufficient evidence to support a finding of transpor-

tation for that purpose or for any other purpose and the need for such a finding is inexplicably disclaimed in the said footnote.

The said footnote, four (4), also indicates, unequivocally, an Appellate rationale to the effect that the Government was not bound by its theory of submission, that the trial Court could go beyond this theory of submission in instructing the jury and that the Government could prevail upon appeal with a broader theory than its theory of submission.

That your Appellant, through Counsel, relied upon the Government's apparent "generosity" in the submission of its cause, was apparent to the Court of Appeals will be manifest if this Petition is granted in that the following citation from Appellant's Argument to the jury was set forth at page twenty-three (23) of the prevailing party's *Brief* and *Appendix:*

> "Now Mr. Musgrove, and I think he was absolutely fair, Mr. Musgrove told you he is not prosecuting the defendant because he and Mrs. Payne are living together as man and wife, or that Mrs. Payne and Mitchell Ross came to Roanoke and registered as man and wife in the Hotel. He's not prosecuting him for that. His charge—the Government's charge is that he brought that woman here intentionally from Indianapolis, Indiana across the state line for the purpose of committing and causing her to enter into acts of prostitution; not with him, but commercial prostitution."

Pursuant to the above cite, the Government's Brief urged that your Petitioner did not duly object to the Court's instructions which went beyond the scope of the Goverment's theory of submission. This agrument

was advanced (apparently with success although no specific determination appears in the Fourth Circuit's decision) in the face of the fact that the opportunity to object to instructions occurs prior to the arguments to the jury and your Petitioner had no opportunity to make additional objections in view of the Government's surprise theory of submissions.

It is here submitted and will be urged in the event that this Petition is granted, that it was incumbent upon the trial Court to police its own instructions in keeping them within the confines of the Government's theory of submission or it was incumbent upon the Government's Attorney to duly advise either the Court of the defendant of what its theory of submissions would be in order that objections could be duly made or the necessary self-policing of the trial Court's own instructions could be undertaken without chance or oversight.

It is here submitted and will be urged in the event that this Petition is granted that where the Government expressly disclaims a theory of action in submitting its cause to a jury and then proceeds to rely upon the disclaimed theory in the instructions of the Court and in its endeavors to prevail upon appeal, it is impossible for an Appellate Court to determine whether the jury's verdict was predicated upon the Government's theory of submission or upon the disclaimed cause of action and where such a matter is indisputable manifest on the record, a new trial is mandatory.

It is here submitted and will be urged in the event that this Petition is granted, that it is contrary to due process to permit a litigant to disclaim a cause of action in submitting its cause to the jury and to rely and

prevail upon the disclaimed cause of action upon appeal at the same time boasting of its "generous" disclaimer in its Brief.

The "generosity" of the Government's Attorney continued even into his Appellate Brief where he grants, at page eleven (11) therein, that:

> "It is true that it is not the general policy of the Government to prosecute non-commercial cases under the Mann Act, unless there are unusual circumstance present."

Government policy is not projected into the realm of Federal affairs for the mere purpose of inciting lip service and the perpetration of trickery upon juries and Courts. Government policy, where recited and proclaimed, entitles a litigant or defendant to rely upon same in the preparation and undertaking of a cause.

3. The question of the sufficiency of the evidence to convict your Petitioner was not disposed of by the United States Court of Appeals for the Fourth Circuit in its decision. In footnote four (4) to its decision, the Court of Appeals stated that it did not consider whether the conviction could stand in the absence of evidence to the effect that your Petitioner indulged in commercial pandering.

It was urged continually in your Petitioner's Original Brief, his Reply Brief and in his Petition For Rehearing Brief, that a conviction under 18 USCA, Sec. 2421, the Mann Act, cannot stand where there is a failure of proof to the effect that the interstate transportation of a female was undertaken primarily for immoral purposes. It was further urged in your Petitioner's Briefs that there was such a failure of proof. But the

Court of Appeals expressly failed to rule upon this issue.

The body of the Court's decision contains, not an Appellate finding, but an argumentative entry to the effect that if the jury believed that there was interstate transportation for the purpose of commercial prostitution, (and that it must have so believed because of the Government's theory of submission), then the evidence clearly supported the ultimate finding that the interstate transportation had been done with the intention of prostituting the defendant's female companion. This argumentative finding of the Circuit Court was entered in the face of the trial Court's instruction that the jury could return a verdict of guilty if it were found that the interstate transportation was undertaken for immoral purposes other than commercial prostitution.

Without indulging in a re-hash of the testimony and evidence submitted to the jury, it is here set out, that if this Petition is granted, the record will reveal that the Government's evidence, in substance, amounted to the substantially uncorroborated testimony of one lone witness who admitted that he had given contrary sworn testimony in proceedings pursuant to the same cause and who further admitted that he had been pressured to change his original testimony. The remaining witnesses gave testimony which was neutral or favorable to the material issue of whether your Petitioner had engaged in commercial pandering. All of the witnesses had been Government's witnesses in the Grand Jury proceedings and they were called by the Government or by the Court during the trial in chief.

It has been held by this court where it appears as a matter of record that the testimony of an uncorroborated

Government's witness has been directly contradicted by that same witness's sworn statements on other occasions this will not constitute sufficient evidence to warrant or support a verdict of guilty in the face of contrary testimony by unimpeached witnesses. In *Hammer v United States*, (1925) 271 U.S. 620, 46 S.Ct. 603 this court so held, stating:

> "Here the sole reliance of the government is the unsupported testimony of one for whose character it cannot vouch — a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited."

It is here submitted and it will be urged in the event that this Petition is granted, that due process of law requires a more substantial case than that entered below if a conviction achieved thereby is to be sustained. Your Petitioner is not contending that there was no evidence to go to the jury but it is his position that he need not so contend. In *Matter of Case*, 214 N.Y. 199, it was stated by Judge Cardozo:

> "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

Under all of the circumstances of this case it is respectfully submitted that a serious question of the standards of proof in Federal criminal cases is presented, requiring review by this Court.

4. The decision of the United States Court of Appeals for the Fourth Circuit in this cause makes no mention of

your Petitioner's contention that the trial Court erred in refusing to instruct on the credibility of a witness who admitted to committing perjury with respect to the matters material to the cause therein. Such instructions were duly tendered and refused by the trial Court and the issue created by the said tender and refusal was duly presented to the Circuit Court by your Petitioner upon appeal.

It is here submitted and it will be argued in the event that this Petition is granted, that the refusal to instruct specifically on the question of crediting the testimony of an admitted perjurer constitutes a deprivation of due process.

5. There was no evidence warranting the submission of the cause to the trial jury.

In *United States v. C. M. Grace*, 73 F. 2d 294, the defendant took prosecution witness across state lines on the first trip in question for purposes pursuant to church affairs when it occurred to him to have intercourse with the prosecution witness on the floor of his chauffeur driven car and he supplemented said intentions with an unsuccessful attempt. Two weeks later the Bishop asked prosecution witness to take a second trip with him across state lines for purpose of playing the piano for him in Baltimore. After the piano playing the defendant and prosecution witness went into the District of Columbia where the defendant had a home. They had intercourse at defendant's house. The indictment was brought in New York which was where the first trip originated.

The Court held that the mere fact that the journey from New York was followed by sexual intercourse on a later journey was not relevant and the attempt perpe

trated on the floor of defendant's car was not sufficient to indicate that defendant's prime purpose for the trip was not in the realm of church affairs.

So, for the sake of illustrations, arguendo, the fact that the woman engaged in prostitution does not render the transportation unlawful if the transportation occurred without an immoral purpose: See *Mortensen v. United States*, supra, 73 C.J.S., Sec. 13, p. 256.

The Court permitted testimony, over the objection of defendant, by the admitted perjurer Henderson as to several conversations had in the absence of Ross in the hotel in Roanoke concerning the activities of Mary Lynn Payne, but these conversations mostly stemmed from statements or conversations of Henderson who testified that on three different occasions he went before the Grand Jury that indicted the defendant herein. Against this we have the testimony of Byers and Rogers that Mrs. Payne always conducted herself as a lady, we have six or seven bellboys who were available but were not called by the Government although Henderson testified they worked at the hotel (A-130) and we have Paul Chewning, who allegedly was taken to Mrs. Ross' room and we have F.B.I. agent Hall who was not called to testify for the Government, and we have F.B.I. agent Settles who played his prominent part, but he too was not called as a Government witness. Again, we repeat, absent the testimony of the admitted perjurer Henderson there is an absolute absence of any evidence as to any prostitution by any Government witness. In *Neff v. United States*, 105 F. 2d 688, the Court held that the defendant drove a car back and forth across a State line while making continued attempts to seduce the prosecution witness. He assaulted her and had intercourse near her

home in the State from whence they started and prosecution witness then walked to her home in a bedraggled state where her condition was observed by corroborating witness.

The Court held that the conduct of parties shortly before and after transportation, while it cannot be regarded as an element of the offense, can be used as evidence. It was further held that while the defendant was not accused of assault, evidence of assault arising from prosecution witness' physical condition was admissible as evidence of conduct shortly after transportation which conduct in turn was admissible as evidence of intent.

Compare *Long v. United States*, 160 F. 2d 700, wherein the Court held that if one of the dominant purposes of interstate transportation of women is to engage in immoral practices, it is a violation of the Mann Act even though there may have been a legitimate purpose. But the interstate transportation of females must be for immoral purposes which are present in the mind of the offender prior to the conclusion of the interstate journey, said conclusion presumably occurring immediately after the last State line is crossed. An immoral purpose first conceived at the end of the journey is not sufficient. *Shama v. United States*, 94 F. 2d 1. The immoral purpose, i.e., must exist at the time the journey was planned or made, no matter what may have occurred afterward. *Long v. United States*, supra. The testimony of the first Government witness, F.B.I. agent Brannon, precludes any suppositions that an immoral purpose existed at the time the journey was planned or made.

Robert Brannon, the F.B.I. agent, testified that he interviewed the defendant, Mitchell Ross, who told me he was in the jewelry business, traveled frequently and had registered in hotels in Roanoke, Virginia, with Mary Lynn Payne, who had accompanied him; that they had registered as Mr. and Mrs. Mitchell Ross and also as Mr. and Mrs. Marberger and that Ross denied any knowledge of Mary Lynn Payne's activities in regard to prostitution. (A 54-59).

Thus it is seen by a Government witness that the conduct of the parties before the transportation indicated a purpose other than an immoral purpose.

6. The refusal of the Court to give required cautionary instructions was reversible error.

The Court committed grievous reversible error in refusing to give defendant's tendered Instruction No. 7 and 7A for the reason that the Government relied solely upon the uncorroborated testimony of the admitted perjurer Henderson that cautionary instructions were most meaningful. The utter lack of credibility of the key Government witness Henderson, called for the exercise of the supervisory powers of the trial Court to guarantee the untainted administration of justice. The particular circumstances of the case here only heighten the importance of the cautionary instruction. The jury had no way of determining the status of the weight to be given the testimony of the admitted perjurer Henderson in the absence of a proper charge.

In this case the trial Judge failed to give the jury the cautionary instructions as requested in Instruction No. 7 and 7A which relates to the key Government witness Henderson. This is more emphasized by the

fact that the Court permitted testimony by Henderson as to conversations had in the absence of defendant Ross and this is a classic example of that described in *Glasser v. United States*, 315 U.S. 60, where "hearsay" would lift itself by its own bootstraps to the level of competent evidence."

The trial Judge failed to give the jury the cautionary instruction as to the uncorroborated accomplice testimony of the decisive Government witnesses. *Tomlinson v. United States*, 93 F. 2d 652 (D.C. Cir. 1937) cert. den. 303 U.S. 646; *Risinger v. United States*, 236 F. 2d 96, 99 (5th Cir. 1956) reh. den. 236 F. 2d 100 (5th Cir. 1956).

While in the Federal jurisdiction an accused may be convicted upon uncorroborated testimony of an accomplice *Holmgren v. United States*, 217 U.S. 509 (1910), this rule is inextricably interwoven with the requirement that the Court instruct the jury that the accomplice's testimony must be viewed with extreme caution. *Egan v. United States*, 287 Fed. 958, 964, (DC Cir 1923). The right of the Federal Court Judge to comment upon the evidence has, in regard to accomplice testimony, furnished an indispensable safeguard protecting the accused and the fair administration of justice against the potentiality of abuse arising from accomplice testimony. *Freed v. United States*, 266 Fed. 1012, 1014-1015 (DC Cir. 1920); *Phelps v. United States*, 252 F. 2d 49, 52 (5th Cir. 1958); *McGinness v. United States*, 256 Fed. 621, 625 (2d Cir. 1919).

The cautionary instruction is the safeguard established in the Federal jurisdiction which permits conviction upon uncorroborated accomplice testimony. *Holmgren v.*

United States, 217 U.S. 509 (1910); *Caminetti v. United States*, 242 U.S. 470, 495 (1917). It is the answer to the trend of the State Courts requiring corroboration of such testimony.

But, where as here, the cautionary instruction is not given, conviction rests upon uncorroborated accomplice testimony considered by the jury without the standard necessary to protect the defendants. The result so clearly threatens the administration of justice as to require correction even where there is a failure to request the cautionary instruction at trial. *United States v. Levi*, 177 F. 2d 827 (7th Cir. 1949); *Sykes v. United States*, 204 Fed. 909 (8th Cir. 1913); *Stephenson v. United States*, 211 F. 2d 702 (9th Cir. 1954).

RESUME

It is difficult to perceive how a more unusual situation could develop as in this case where the chief Government witness, an admitted perjurer, gave uncorroborated testimony that was necessary and decisive to the Government's case where the trial Court refused to give cautionary instructions as requested. Any one of the aforesaid grounds would suffice to warrant the granting of a new trial, but in this case we have all three combining here, namely,

(a) The complete absence of proof, and

(b) The Court's refusal to give cautionary instructions, when requested, and

(c) An admitted perjurer who changed his testimony before the Federal Grand Jury that returned the indictment three times and then in addition lied about his

(Henderson's) conversations with the chief Government investigator Settles.

Giving the Government the benefit of every reasonable doubt, the most that can be said is that the evidence gives equal support to inconsistent inferences.

". . . Certainly, two offenses of removal, deposit and concealment of distilled spirits with intent to defraud the Government could be committed in a single criminal episode spanning nine days. . . . Again, the most that can be said is that the evidence gives equal support to conflicting inferences regarding the existence of a 'single criminal episode.' Accordingly, the order of deportation is not based upon sufficient evidence, and plaintiff's motion for summary judgment must be granted." *Zuno v. Woodall*, E.D. Ill., 174 F. Supp. 531, 537, 538, 538, 539.

"If the administrative trier of fact draws inferences that are conclusive and binding on a court of review if there is a substantial basis of fact for them. *Caravelle v. Folsom*, D.C. N.D. Ill. 1958, 170 F. Supp. 777, affirmed: *Caravelle v. Fleming*, 7 Cir., 268 F. 2d 875. Further, with regard to inferences:

". . . 'substantial evidence' is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." *Appalachian Electric Power Co. v. National Labor Relations Board*, 4 Cir., 1938, 93 F. 2d 985, 989.

"Cases cited: In *Galt Exhaust Co. v. Marie v. Walker & Son Co.*, 6 Cir., 1942, 124 F. 2d 420, 425, at pages 425-426; certiorari denied, 1942, 316 U.S. 682, 62 S. Ct. 1268, 86 L. Ed. 1755, the Court, in holding that the trial Court should have directed a verdict in favor of the defendant, stated:

"*** to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial."

CONCLUSION

It is respectfully submitted that this is a case where injustice has been done and a grievious judicial mistake made.

WHEREFORE, Petitioner prays this Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM C. ERBECKER
Attorney for Petitioner

APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 8942

UNITED STATES OF AMERICA,
Appellee

vs.

MITCHELL KOSS,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.

TED DALTON, *District Judge*.

(Argued June 13, 1963. Decided September 13, 1963)

Before Haynsworth and Boreman, Circuit Judges, and Winter, District Judge.

William C. Erbecker, Pro hac vice, for Appellant, and Lawrence C. Musgrove, Assistant United States Attorney, for Appellee.

HAYNSWORTH, Circuit Judge:

Convicted of violation of the Mann Act[1] the defendant has appealed, questioning the sufficiency of the evidence to sustain the conviction and the refusal of the Court to grant certain requested instructions. We find no error.

On three occasions the defendant, with the victim, checked into a hotel in Roanoke, Virginia, registering as man and wife. Interstate transportation of the woman is admitted. A bellboy, the principal prosecution witness, testified to facts which, if true, clearly show that the victim engaged in prostitution in Roanoke and that the defendant assisted in the procurement of patronage for her and in the disbursement to the bellboy of his portion of her charges. His testimony, to some extent, was corroborated by that of a night watchman who saw the victim, at late hours in the night, leaving rooms other than the one assigned to her and the defendant.

Before the indictment the bellboy, the principal prosecution witness, appeared before the grand jury on three separate occasions. The testimony taken by the grand jury was not introduced at the trial[2], but there was testimony that the bellboy, when he first appeared before the grand jury, denied that he knew of facts indicating the victim's prostitution. He testified at the trial that his testimony before the grand jury, when he first appeared before it, was untrue. He said that he had been told by the defendant not to reveal the facts, and he

[1] 18 USCA, Sec. 2421

[2] The District Attorney offered to agree that all of the grand jury testimony be admitted, but he objected to the defense effort to secure only a portion of it. The Court indicated its willingness to admit all of the grand jury testimony, but the defendant found that unacceptable.

feared retaliatory measures the defendant might take if he told the truth to the grand jury.

Because the bellboy admitted that he lied to the grand jury when he first appeared before it although he undertook to explain why he did so, the defendant would have us disregard completely his trial testimony. That, we cannot do. His admission of his earlier inconsistent testimony and his explanation of it created issues of credibility which were properly submitted to the jury. When the Court clearly instructed the jury that, in considering the credibility of a witness, they might take into account his earlier inconsistent statements, it was not essential that the Court also instruct the jury further as to the weight to be given the testimony of a perjurer.

The jury was entitled to accept as true the trial testimony of the bellboy. If it believed it, as it must have, for the parties went to the jury on the basis that there should be no conviction unless there had been prostitution of the victim,[4] the evidence clearly supported

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[3] Indeed, as the defendant himself brought out at the trial, the grand jury also indicted the defendant for attempting to tamper with and unlawfully influence grand jury witnesses.

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[4] The Court's instructions approved the basis of the attorney's submission of the case. As submitted, the principal issue before the jurors was the prostitution vel non of the victim. Before the Court, the Government sought to dismiss the appeal upon the ground that it conclusively appears that the purpose of the interstate transportation was the engagement by defendant and victim in illicit sexual relations. It advances the unquestioned principle that it was not incumbent upon it to prove that the purpose encompassed hiring of the female for the sexual gratification of others than the defendant.

Since we have found that the evidence warranted a finding of prostitution of the female, we do not consider whether, in the light of the Government's trial concession and the basis of the submission of the case to the jury, the conviction might stand in the absence of such evidence.

the ultimate finding that the interstate transportation had been done with the intention of prostituting the defendant's female companion.

Affirmed.

ORDER AFFIRMING JUDGMENT

United States Court of Appeals for the Fourth Circuit

Baltimore, Maryland

FRIDAY, SEPTEMBER 13, 1963

Before:

Haynsworth, *Circuit Judge*
Boreman, *Circuit Judge*
Winter, *District Judge*

No. 8942

UNITED STATES OF AMERICA *Plaintiff-Appellee* vs. MITCHELL ROSS, *Defendant-Appellant*	Appeal from the United States District Court for the Western District of Virginia, Roanoke Division.

This cause came on to be heard on the transcript of the record for the United States District Court for the Western District of Virginia, Roanoke Division, and was argued by Counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

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No. 613

In the Supreme Court of the United States

October Term, 1962

[illegible], Sam, petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[illegible]

[illegible]

[illegible]
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
Attorney,
Department of Justice,
Washington, D.C., [illegible].

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 613

MITCHELL ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27–30) is reported at 322 F. 2d 306.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1963. A petition for rehearing was denied on October 14, 1963. The petition for a writ of certiorari was filed on November 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for violation of the Mann Act.

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2. Whether the district court properly instructed the jury on the effect to be given to a witness's admission that he had committed perjury before the grand jury.

3. Whether the court's instructions submitted the case to the jury on a legal theory not urged by the government.

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the Western District of Virginia of a violation of the Mann Act and was sentenced to imprisonment for four years. The conviction was affirmed on appeal.

1. The government's evidence and the testimony of two witnesses called by the court may be briefly summarized:

The records of the Patrick Henry Hotel in Roanoke, Virginia, demonstrated that on four occasions between April and June, 1962, petitioner checked into the hotel with a woman registered as his wife (Tr. 47–53). An F.B.I. agent testified that petitioner admitted to him that petitioner had traveled with a Mrs. Mary Payne from Indianapolis, Indiana to Roanoke and registered at the hotel as man and wife. Petitioner had denied any knowledge of prostitution on Mary Payne's part (Tr. 55–59). Henderson, a bellman at the hotel, testified that he obtained "dates" for the woman he knew as petitioner's wife (whom he identified from a photograph) (Tr. 67–69, 72–73) and received 40% of her earnings (Tr. 76). The dates were usually filled by sending Mrs. Payne to the room

of the man (Tr. 72–73). If the dates were filled in the room occupied by petitioner and Mrs. Payne, petitioner would leave the room after being notified that a customer was coming (Tr. 75). When business was slow, petitioner would tell the bellman "to go out and get us some business" (Tr. 78–79). On some occasions, petitioner paid the bellman the money due him (Tr. 77, 78). On cross-examination, the bellman testified that when he first appeared before the grand jury he had denied knowing that Mrs. Payne was working as a prostitute (Tr. 117), but he admitted that this testimony had been false (Tr. 104) and that it had been corrected on subsequent appearances before the grand jury (Tr. 105, 116–117). He explained that he had been warned by petitioner not to reveal the facts (Tr. 88), and that he thought petitioner was a member of "the syndicate" (Tr. 127, 128). The night watchman at the hotel also testified that he had seen Mrs. Payne on two or three occasions leaving rooms other than her own after midnight (Tr. 143–145). Two other bellmen, named by Henderson, were called as court witnesses and said that they had no knowledge of any prostitution by Mrs. Payne (Tr. 156–159, 169–173).

2. The court instructed the jury that the credibility of a witness might be impeached by evidence that he had previously given contradictory sworn testimony and that if it appeared that any witness had been impeached in this manner, the jury had a right "to take into consideration such impeachment, in determining the value of the testimony of such witness" (Tr. 285). The court declined to give petitioner's requested in-

structions that if the jury found that any witness had previously committed perjury, it could "disregard the entire testimony of such witness except insofar as such witness may have been corroborated by other credible testimony," and that "all evidence of an admitted perjurer should be considered with caution and weighed with great care" (Tr. 217(a)–217(b)).

3. In argument to the jury, government counsel stated that the prosecution's case was based "solely on commercial prostitution," and that the jury should not return a guilty verdict "unless you believe beyond a reasonable doubt that this defendant brought this woman into Virginia, across state lines, for the purpose of prostitution" (Tr. 219). Defense counsel in his summation referred to the statement by government counsel that he was not prosecuting petitioner because petitioner and Mrs. Payne lived together as husband and wife (Tr. 246–247). The court instructed the jury that in order to find petitioner guilty it had to find beyond a reasonable doubt that petitioner knowingly transported Mrs. Payne "for the purpose of prostitution, debauchery or other immoral purposes" (Tr. 285–286) and that his intent and purpose at the time of transportation was to have Mrs. Payne "prostitute herself, or engage in other immoral acts" (Tr. 289–291). These instructions were proposed by petitioner without the words "other immoral acts" or "other immoral purposes." When the court indicated its intention to add these phrases, defense counsel said he had no objection (Tr. 210–211).

In the court of appeals, the government argued that petitioner's admitted acts in transporting Mrs. Payne as his mistress would alone support the conviction. The court of appeals did not read the district court's instructions as submitting any such issue to the jury and saw no occasion to decide any question other than the sufficiency of the evidence to support the charge of commercial prostitution.

ARGUMENT

1. The sufficiency of the evidence to sustain the conviction presents no issue warranting review by this Court. If the jury believed the testimony of Henderson, the bellman, and the corroborating testimony of the night watchman, there was ample evidence to support the conviction. Henderson's earlier sworn denial of knowledge of prostitution activities, as well as the testimony of the other bellmen, were matters for the jury to evaluate. See *Proffit* v. *United States*, 316 F. 2d 705 (C.A. 9).

2. The judge adequately instructed the jury that the contradictory sworn testimony originally given by Henderson was impeachment evidence to be considered in determining the truthfulness of the witness. The court was under no duty to instruct in the precise language requested by petitioner. *United States* v. *Parker*, 217 F. 2d 672 (C.A. 2), certiorari denied, 349 U.S. 959. Nor has petitioner suggested any authority for the proposition that the court was required to instruct along the lines which he had suggested.

3. The trial court did not submit the case to the jury on a theory not presented by the government. Both government and defense counsel made it clear to the jury that petitioner was not being prosecuted merely because he lived with Mrs. Payne as man and wife. In view of that fact, there is no reasonable possibility that the jury would have interpreted the judge's reference to prostitution and "other immoral acts" as permitting a conviction to rest merely on the relationship between petitioner and Mrs. Payne. As has been previously noted, defense counsel did not object to the court's amendment of his proposed instructions (Tr. 210–211).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

DECEMBER 1963.